No. 15578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in Bankruptcy of the Estate of JOSEPH ESTEN, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement.

Under this heading, Appellant states:

> "The facts as found by the District Court [Tr. p. 6] are as follows:"

and then sets forth the allegations of the Petition filed by the bankrupt before the Referee in Bankruptcy. Apparently, Appellant had incorporated these allegations in the Findings of Fact made by the Referee and in order that there may be no confusion, we desire to state that these facts were found by the Referee in Bankruptcy, whose Order was reversed by the District Court Judge.

Appellant's Summary of Argument.

The statement made by Appellant under this heading is not only misleading, but entirely erroneous as will hereinafter be demonstrated.

The United States District Court properly determined that the Declaration of Homestead herein did not substantially comply with the statutory requirement in that the Declaration must contain a description of the premises.

The Declaration [Trustee's Ex. 1] is substantially as follows:

> "KNOW ALL MEN BY THESE PRESENTS: That I, ANNA ESTEN, do certify and declare as follows:
>
> "(1) I am a married woman and my husband's name is JOSEPH ESTEN.
>
> "(2) I am now residing with my family, consisting of My husband, on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows:
>
> > "Lot 104, Tract 5069, as per map recorded in Book 56, Pages 82 to 85, of Maps in the office of the County Recorder of said County.
>
> "(3) I claim the land and premises hereinabove described, together with the dwelling house thereon, and its appurtenances, as a Homestead.
>
> "(4) My husband has not made any declaration of homestead. Therefore, I make this declaration for the joint benefit of myself and my husband.
>
> "(5) I estimate the actual cash value of the land and premises hereinabove described to be Twenty-one thousand and No/100 ($21,000.00) Dollars.

"(6) No former declaration of homestead has been made by me or by my husband, except as follows: NONE.

"(7) The character of said property so sought to be homesteaded is as follows: Duplex.

"IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of March, 1955.

/s/ ANNA ESTEN
(Wife)"

Appellant also states:

"A description of land in a homestead need not be more particular than in a conveyance. Great liberality in this respect will be allowed by the courts. Parol evidence is admissible to identify the land in the event of a description containing an erroneous lot number."

This statement is not supported by any authority cited by Appellant. How can it be said that a description such as contained in "Trustee's Exhibit 1," *supra,* would tend in any manner, shape, or form to convey Lot "204" of Tract No. 5069? This is a definite and certain description of real property not belonging to Appellant and it is contended that this could not be considered a *substantial compliance* with the statute.

ARGUMENT.

It is respectfully contended that the United States District Court, in reversing the Referee's Order, properly held that the Declaration of Homestead did not substantially comply with the statutory requirements. In support of the District Court's decision, the following cases were cited which Appellant refers to in detail under the heading: *"Digest of Cases Cited by the U. S. District Court:"*

Harris v. Duarte, 141 Cal. 497, is a case wherein the declarant did not reside on the land described, which is the situation here.

Carey v. Douhitt, 140 Cal. App. 409, was also a case wherein the declarant recorded a homestead on property upon which she did not reside.

Donnelly v. Tregaskis, 154 Cal. 261, is a case in which no proper description was given and it would be impossible to locate the premises from the description in the declaration.

Schyler v. Broughton, 76 Cal. 524. The Court states at page 525:

> "The concurrence of several things are necessary under our statute before exemption can be allowed. Where these several acts have been *substantially performed,* and where the declaration contains *the essence of the statutory requirements,* the construction should be so liberal as to advance the object of the constitution and statute." (Emphasis added.)

Does Appellant contend that where an entirely erroneous description is given that this would constitute "substantial compliance?"

In the case of *Oktanski v. Burn,* 138 Cal. App. 2d 419, the street address of the property was given. Therefore,

the homestead could be located from the street address. No street address is given in the case at bar.

In the case of *King v. Gotz,* 70 Cal. 236, the homestead included other property and, therefore, it could be identified.

In the case of *Rich v. Erwin,* 86 Cal. App. 2d 386, the court stated at page 390:

> "Where the *required acts* have been substantially performed, the construction of the declaration should be liberal, but there must be a *substantial compliance* or the declaration will be *strictly construed.* The statement of an untruth relative to an exemption requirement vitiates the document as the declaration must contain certain information." (Emphasis added.)

In the case of *Johnson v. Brauner,* 131 Cal. App. 2d 713, no question of description was involved and the court merely held that the omission of the statement that "she therefore makes the declaration for their joint benefit" did not invalidate the declaration.

In the case of the *Estate of Fath,* 132 Cal. 609; *Estate of Kachigian,* 20 Cal. 2d 787; and *Marelli v. Keating,* 208 Cal. 528, a liberal construction of the homestead and facts was adopted, but in neither of these cases was the description erroneous.

The cases referred to by Appellant from *Johnson v. Brauner, supra,* are also in the same category, except for the *Estate of Geary,* 146 Cal. 105, in which case the statement was made that the land described was a lot of 160 acres "on which I now reside with my family" and could be identified by inquiry.

Simonson v. Burr, 121 Cal. 582, adopted the language used in *Schyler v. Broughton, supra,* and did not involve an erroneous description of the property.

In *Greenlee v. Greenlee,* 7 Cal. 2d 579, the parties were actually residing on the property at the time plaintiff executed the homestead. No question was raised as to the description.

In *Phelps v. Loop,* 64 Cal. App. 2d 332, the property involved was an apartment house and no question of the description was involved.

Gregg v. Bostwick, 33 Cal. 220, involved property which was used also as a place of business and there was no question about the description.

Keyes v. Cyrus, 100 Cal. 322, involved a case where the probate court set aside a probate homestead and no question of the description was raised.

In *Feintech v. Weaver,* 50 Cal. App. 2d 181, the declaration contained an erroneous recital that declarant was head of a family. No question of description was involved.

Parker v. Riddell, 41 Cal. App. 2d 908, was a case in which the location and character of the property was properly stated.

Beaton v. Reid, 111 Cal. 484, involved the validity of an execution upon the homestead and no question of description was involved.

Oktanski v. Burn, 138 Cal. App. 2d 419, is a case in which the declaration covered other property including the homestead and the description was correct.

Johnson v. Brauner, 131 Cal. App. 2d 713. The only question involved was whether or not the declaration should contain a statement that it was made for the joint benefit of husband and wife.

In the case at bar the Declaration, it is true, described the property by its Tract number and the Map and Book wherein the Tract was recorded, but no claim is made that the property upon which the Appellant resided was the only lot in the Tract. If such were the case, the ruling might be different.

Appellant states on page 18 of his opening brief:

> ". . . and that the Appellant and his wife were actually residing on the property when the Declaration was filed."

This is a misstatement, as the Declaration [Trustee's Ex. 1] states that the Declarant was actually residing on Lot 104 of said Tract.

We have no quarrel with Appellant when he states that certain cases have upheld a homestead when the declaration referred to a "larger area", because the larger area contained the description of the premises and the same could be located from a reference to the declaration.

Appellant states on page 19 that:

> *"It Is Not Necessary That a Description of Land in a Homestead Declaration Should Be More Particular Than in a Conveyance."*

We do not deem it necessary to refer to the numerous cases cited by Appellant under this heading, as we respectfully contend they are not in point and that not one of said cases holds anything different from the cases cited under the liberal construction rule.

The general principle of law enunciated by the cases and Section 2077 of the Code of Civil Procedure is that the description is sufficient if it can be rendered certain by extrinsic evidence; that it must be described so as

to be capable of identification. That is not the case here. As previously pointed out, the property was erroneously described as Lot 104, upon which the Declarant stated that she was residing with her family, whereas, in fact, she, was residing on Lot 204. No extrinsic evidence could identify the property from the description contained in the Declaration. If the Declaration here contained the street number, the rule would be otherwise, because in that event the actual property upon which the Declarant and her family were residing could easily be identified and located. In any event, we are not here concerned with a problem arising between a grantor and a grantee. Here, creditors rights are involved and because of the wrong description, the creditors had no notice of the filing of the Declaration.

A Declaration of Homestead Cannot Be Reformed Retroactively.

The Civil Code of the State of California provides as follows:

> "Sec. 3399. When Contract May be Revised. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value."

It is contended that a Declaration of Homestead does not come within the provision of the section quoted for the reason that it is not a contract, but a mere notice.

We believe that the rules applied to mechanic's liens are applicable for the reason that a declaration of homestead can only be construed as a notice, and if a notice is defective, the only remedy is to give a new notice.

Madera Flume, etc. Co. v. Kendall. 120 Cal. 182, is a case in which an attempt was made to reform a notice of mechanic's lien and the court, at page 183, stated:

> "The notice of its claim filed by the plaintiff was not sufficient to authorize an enforcement of the lien. . . . The notice of lien which is filed for record must be complete in itself at that time in order to authorize its enforcement and is not capable of being amended or reformed."

Goss v. Strelitz, 54 Cal. 640;

Fernandez v. Burleson, 110 Cal. 164.

In any event, here creditors rights have intervened and the title to the undivided one-half interest in the property was vested in the Trustee as of the date of the filing of the Petition in Bankruptcy.

From an examination of the cases cited by Appellant, it is difficult to understand how *Carey v. Douhitt, supra,* is in conflict with *Oktanski v. Burn, supra,* or *Donnelly v. Tregaskis, supra.* In the *Oktanski* case the street address was given and in the *Donnelly* case the description was given as:

> ". . . being lot No. 14 in block No. 266 according to the map of said Vallejo made by C. R. Rowe, Surveyor."

It appeared that no such map was of record and the court stated at page 264:

> ". . . where a description is dependent for its sufficiency upon some other instrument, such as a

> map, the map properly identified must be produced, or in some manner established, or the description must fail."

By inference, Appellant suggests that there is a "latent ambiguity" in the description used in the Declaration here. However, he has failed to point out where the ambiguity exists. We contend that the description is certain and positive and is not subject to any rule regarding latent ambiguity.

The Parol Evidence Rule Is Not Applicable in This Case.

Appellant has cited no cases holding that the parol evidence rule is applicable to correct a wrong description of the premises. The following cases cited by Appellant could not apply here:

In *Re Kossack,* 113 Fed. Supp. 884, the only question involved was whether or not the homestead was good where the declarants did not place their signatures at the end of the purported declaration.

Steward v. United States, 316 U. S. 353, is not in point as the description could be made certain from the document itself.

Carter v. Bacigalupi, 83 Cal. 187, involves the description of a mining claim and the court, in holding that the description was sufficient, stated at page 190:

> "It is argued, however, that the center line is not sufficiently described, but if either end of the line may be located, the other may be found."

Redd v. Murry, 95 Cal. 48, refers to a deed, the description in which could be made certain by the production of a map referred to in the deed.

Reamer v. Nesmith, 34 Cal. 624, is not in point and counsel has only quoted a portion of the statement made by the court in admitting extrinsic evidence. We quote in full from page 626:

> "For the purpose of determining the question it was competent to ascertain by extrinsic evidence the precise location of the land in dispute, for in no other way can effect be given to the deed by applying it to the subject matter. Parol evidence was, therefore, admissible—the true location of the ground in dispute having been agreed upon, or otherwise ascertained—to show the true location of all the descriptive designations and calls named in the deed. This being done, it will be found that all of the descriptive terms found in the deed apply to the land in dispute, or that they do not; if the latter, the land has not passed by the deed; but if some of them apply to the land and the others do not, then, if those which do apply describe the land with sufficient certainty, the land is passed, for those which do not apply may be rejected as false."

The rule here set forth cannot be applied in the case at bar, as no extrinsic or parol evidence could be introduced to prove that the descriptive terms found in the homestead apply to the land in dispute, that is to Lot 204.

In *Blume v. MacGregor,* 64 Cal. App. 2d 244, cited by Appellant, the court stated at page 251:

> "In general, if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient."

Does Appellant contend that this rule could be applied here? As stated before, taking the description contained

in the Declaration, no one could find the property upon which the Declarant resided.

The Bankruptcy Court Has No Jurisdiction or Power to Order Reformation of a Declaration of Homestead.

As heretofore pointed out, it is contended there has been no substantial compliance with the statutory requirements as to description.

Appellant refers to *Fowler v. Hart,* 14 L. Ed. 186 (13 How. 373). This case involved a mortgage and it is respectfully contended that a mortgage is a contract between two parties and is, therefore, subject to reformation. A declaration of homestead is not a contract.

Hanlon v. Western Loan, 46 Cal. App. 2d 580, referred to a deed of trust which is also a contract.

Gardner v. Johnson, 195 F. 2d 717, merely states the general policy of Congress regarding exemptions and does not effect the requirements of the state statutes regarding substantial compliance. Appellant states at page 36:

> ". . . and that finally that portion of the homestead which contained the incorrect lot number could be properly disregarded by the Referee."

If this were done, the description would read:

> "Tract No. 5069, as per map recorded in Book 56, Pages 82 and 85, of Maps in the office of the County Recorder of said County." [Trustee's Ex. 1.]

It is apparent from such a description, no lot could be located in Tract No. 5069.

Conclusion.

We believe that we have demonstrated, and likewise Appellant has demonstrated in his Brief, the following principles applicable to the homestead laws of the State of California.

1. The declaration must contain a description of the premises sufficient to identify the same, with or without the aid of extrinsic evidence.

2. Substantial compliance with the homestead laws does not apply where there has been a wrong description of the premises contained in the declaration of homestead, and

3. A declaration of homestead is not a contract and is, therefore, not subject to reformation.

For the foregoing reasons, the Order of the District Court should be affirmed.

Respectfully submitted,

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Attorney for Appellee.